Supreme Court, U.S.
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No. 02-1624

In The

Supreme Court of the United States

ELK GROVE UNIFIED SCHOOL DISTRICT, *et al.*,

Petitioners,

v.

MICHAEL A. NEWDOW, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF CHRISTOPHER L. EISGRUBER AND LAWRENCE G. SAGER AS AMICI CURIAE SUPPORTING RESPONDENT MICHAEL A. NEWDOW

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QUESTION PRESENTED

Whether a public school district policy that requires teachers to lead willing students in reciting the Pledge of Allegiance, which includes the words "under God," in the absence of an alternative secular form of the Pledge, violates the Establishment Clause of the First Amendment, as applicable through the Fourteenth Amendment.

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STATEMENT OF INTEREST[1]

Amici are teachers and scholars of constitutional law who specialize in the field of religious liberty. We have been teaching and writing in the field of constitutional law for approximately thirty-five years (Sager) and fifteen years (Eisgruber), and we have been writing, lecturing, and testifying about religious liberty issues for the last decade. We submit this brief for two closely-related reasons. First, we want to alert the Court to an important argument neglected both by the courts below and the parties. Second, we want to call the Court's attention to a remedial option that is obscured by the lens through which the courts below and the parties have viewed this case – an option that is more reasonable and just than the drastic alternatives put at issue by the parties and the courts below. We offer these arguments on our own behalf, in the interest of an outcome that we believe will best serve the Constitution.

This brief is filed with the consent of the parties. Documentation of that consent is submitted with this brief.

SUMMARY OF ARGUMENT

The courts below and the parties share a view of this case pursuant to which the outcome turns on a single

[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than the amici curiae, made a monetary contribution to the preparation and submission of this brief.

question: Do the words "under God" render recital of the Pledge of Allegiance in a public school equivalent to a religious exercise, such as a prayer or benediction? On this view of the case, if the answer to that question is 'yes', then such a recital is unconstitutional; and, if it is 'no', then such a recital is perfectly permissible. Accordingly, on this view, the Court is confronted with a sharp and unappealing choice between two, winner-take-all readings of the Constitution. On one reading, a pledge venerated by many Americans must be purged of its reference to God in order to be acceptable in one of its most familiar environments, the public schools. On the other reading, students who find the Pledge's reference to God an affront to their beliefs can be put to the choice of participating in a ritual which includes this affront, or of forgoing the opportunity to affirm allegiance to their country.

The Court must often make hard choices, but the Constitution does not compel it to make this one. The Constitution permits the government to structure civil ceremonies that incorporate religious elements, provided that two important requirements are met. First, the religious elements included in the civil ceremony must be fundamentally non-sectarian; and second, the government must make available an officially recognized, secular alternative to the religious version of the ceremony. Thus, for example, Article II provides that the president may either *swear* or *affirm* to uphold the Constitution. Article II is not in this respect either aberrant or anachronistic. General principles of Establishment Clause jurisprudence are consistent with civil ceremonies like the swearing of an oath by the president, where a secular alternative is also available. The president's oath of office and other civil ceremonies that share its basic features serve to permit

those who wish to solemnize their public commitments with religious references to do so, while at the same time ensuring that participation in the religious aspects of such a ceremony are the product of individual choice rather than legal prescription.

The point of such ceremonies is the making of a promise of loyalty or fixidity of purpose; the optional religious elements are merely freely-chosen means of solemnizing that promise. Most importantly, under those limited circumstances, the optional religious elements in a civil ceremony do not carry with them the endorsement of a religious viewpoint or the disparagement of competing religious viewpoints.

Accordingly, the inclusion of the phrase "under God" does not, by itself, render the public recital of the Pledge of Allegiance unconstitutional. But, in order to be consistent with basic principles of the Establishment Clause, such recitals of the pledge must take place under circumstances where an officially-endorsed version of the Pledge which does not include these words is readily available as an alternative means affirming allegiance. Public schools are in this respect especially sensitive environments. School children who wish to profess allegiance to their country are surely entitled to no less a choice than the one that the Constitution guarantees to presidents on the occasion of their taking office. Moreover, absent that choice, public school recitals of the pledge carry the message that religious viewpoints inconsistent with the invocation of God are disfavored. To comply with the Constitution, the Elk Grove School District must give students the option of reciting an officially recognized, alternative version of the Pledge that omits the words "under God." This the District

has not done, and for that reason the Court should affirm the ruling of the Ninth Circuit.

ARGUMENT

This case does not present the Court with a sharp and unappealing choice between two, winner-take-all readings of the Constitution. The Constitution permits a public school to invite students to recite the Pledge of Allegiance, including the words "under God," on the condition that the school also offers its students an officially recognized, secular form of the Pledge that does not include those words. Because the Elk Grove School District does not provide a secular alternative, its ritual recital of the Pledge is unconstitutional; but the school district can satisfy the Constitution by providing such an alternative.

I. Publicly sponsored civil ceremonies may incorporate religious elements so long as (1) those elements are fundamentally generic and non-sectarian and (2) participants in the ceremony are offered an officially recognized, fully secular alternative to those religious elements.

The United States Court of Appeals held that because the School District's Pledge of Allegiance included the words "under God," it was indistinguishable from the prayer rituals held unconstitutional by this Court in *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290 (2000); *Lee v. Weisman*, 505 U.S. 577 (1992); and *Engel v. Vitale*, 370 U.S. 421 (1962). See, e.g., *Newdow v. U.S. Congress*, 292 F. 3d 597, 608 (9th Cir. 2002) ("The school district is . . . conveying a message of state endorsement of a religious

belief when it requires public school teachers to recite, and lead the recitation of, the current form of the Pledge.") That conclusion rests on a misinterpretation of those cases. *Santa Fe*, *Lee*, and *Engel* all involved devotional exercises designed to articulate religious messages: the point of the prayer ceremony was to express respect for a particular understanding of God's will. The District's Pledge of Allegiance is manifestly different. Participants promise fidelity to a flag and to a nation, not to any particular God, faith, theological viewpoint or church. The pledge's tone and content are nationalist rather than spiritual.

This difference is constitutionally significant. The mere inclusion of religious language within a publicly sponsored pledge ceremony does not convert the ceremony into a religious ritual akin to those held unconstitutional in *Santa Fe*, *Lee*, *Engel,* and other cases. On the contrary, publicly sponsored civil ceremonies may sometimes incorporate religious elements without offending the Establishment Clause. For example, when presidents take office, they commonly place their hands on the Bible and swear to uphold the Constitution. The Constitution itself explicitly recognizes that the president's promise of fidelity may take a religious form.* Likewise, witnesses who testify in American courts commonly swear to tell the truth. The Federal Rules of Evidence expressly invite this religious feature of courtroom procedure. Fed. R. Evid. 603 ("every witness shall be required to declare that the witness will testify truthfully, by *oath* or affirmation

* In Article II, Sec. 1, the presidential oath is specified in full, beginning, "I do solemnly *swear* (or affirm) . . . . " (Emphasis added.)

administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so" (emphasis added)). Although the ceremonial promises of presidents, numerous other public officials** and witnesses typically incorporate religious speech, and although the law (including the Constitution itself) expressly contemplates religious phrases in these contexts, these common ceremonies do not unconstitutionally establish religion.

At the very core of modern Establishment Clause concerns is the worry that government may advertently or inadvertently place itself in the position of endorsing some belief systems while disparaging others, and thereby, of endorsing some members of the political community while disparaging others. As this Court has said:

> The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from "making adherence to a religion relevant in any way to a person's standing in the political community."

County of Allegheny v. ACLU, 492 U.S. 573, 594 (1989), quoting *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring). Accordingly, it is particularly

** In Article I, Sec. 3, where provision is made for the Senate to try impeachments, it is stipulated that "[w]hen sitting for that purpose, they shall be on *oath* or affirmation." Article VI stipulates that Senators, representatives and all state and federal executive and judicial officers "shall be bound by *oath* or affirmation, to support this Constitution. . . ." And the Fourth Amendment requires that warrants on probable cause be "supported by *oath* or affirmation." (Emphasis added throughout.)

problematic when public schools sponsor avowedly religious exercises:

> School sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are nonadherents "that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."

Santa Fe Independent School Dist. v. Doe, 530 U.S. at 309-10 (2000), quoting *Lynch v. Donnelly*, 465 U.S. at 688 (1984) (O'Connor, J., concurring).

But, under appropriate circumstances, civil ceremonies that include religious elements can comply with these core Establishment Clause precepts. We can understand both why this is so and what are the conditions of it being so by considering the examples of inaugural and courtroom oaths. The satisfaction of two requirements make these civil ceremonies constitutionally benign.

First, the religious elements in these civil ceremonies are fundamentally generic and non-sectarian. Second, there is a fully secular means of participation in these ceremonies available for those who find the religious version inconsistent with their personal beliefs, or who for any other reason prefer the secular alternative.

When both of these conditions are satisfied, the point of these civil ceremonies is reasonably clear. They are formal occasions for promising fidelity to the principles of office or role. The role of the religious elements in the religious versions of these ceremonies is also reasonably clear. These elements offer religiously inclined persons one

familiar means of solemnizing their promises. And it is the individual participants in these ceremonies, not the state, who choose ceremonial forms that include religious language or symbols. *Cf. Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002) ("our decisions have drawn consistent distinction between government programs that provide aid directly to religious schools and programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals" (internal citations omitted)). Accordingly, these civil ceremonies do not put the government in the position of "appearing to take a position on questions of religious belief." *County of Allegheny v. ACLU*, 492 U.S. at 594.

But when a public ceremony has religious elements that are not phrased in suitably generic terms, or when it does include the alternative of a wholly secular version, precisely the reverse is true. Thus for example, any prayer ceremony, like those at issue in *Santa Fe*, *Lee*, and *Engel*, will bring with it the appearance of government taking a position on questions of religious belief. The government finds itself choosing among formulations the essential point of which is to affirm religious belief, and those formulations will inevitably prefer some religious beliefs over others. That is so regardless of whether the prayer is composed by the state directly, as in *Engel*, or by an agent whom it chooses, as in *Lee*. The very idea of a secular alternative is incoherent in such circumstances, and the absence of such an alternative underscores the underlying point of the prayer exercise, and hence its sectarian meaning.

The absence of a secular alternative in public ceremonies that include religious elements has a second prominent

constitutional vice. Without a secular alternative, some persons will be able to participate in the ceremony only at the cost of compromising their beliefs about religion. Where public office, honor or role is at stake, the ceremony would thereby violate the Establishment Clause prohibition of government "'making adherence to a religion relevant . . . to a person's standing in the political community.'" *County of Allegheny v. ACLU*, 492 U.S. at 594 (1989), quoting *Lynch v. Donnelly*, 465 U.S. at 687 (O'Connor, J., concurring). It would also violate the spirit, if not the letter, of Article VI, which provides that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." U.S. Const., Art. VI; *Torcaso v. Watkins*, 367 U.S. 488 (1961).

Presidential inaugurals, other ceremonial promises specified in the Constitution, and courtroom procedures respect the constitutional requirement that there be an officially recognized secular version of the ceremony in question. Article II permits presidents to affirm, rather than swear, that they will uphold the Constitution. Article I, Article VI, and the Fourth Amendment also provide for secular affirmations in lieu of religious oaths. Federal courtroom procedure invites witnesses to affirm, rather than swear, that they will tell the truth. See, e.g., Fed. R. Civ. P. 43(d) ("Whenever under these rules an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof."); Fed. R. Evid. 603, Advisory Committee notes (explaining that the rule "is designed to afford the flexibility required in dealing with religious adults, atheists, conscientious objectors, mental defectives, and children"); *Gordon v. Idaho*, 778 F. 2d 1397, 1400-01 (9th Cir. 1985) (district court had a constitutional obligation to find alternative formula for witness who refused,

on religious grounds, either to "swear" or to "affirm" that he would tell the truth); *Moore v. United States*, 348 U.S. 966 (1955) (per curiam) (witness who declined on religious grounds to use the word "solemnly" in an affirmation to tell the truth could testify without using that word); and Comment, *Religion-Plus Speech: The Constitutionality of Juror Oaths and Affirmations Under the First Amendment*, 34 Wm. and Mary L. Rev. 287, 293-295 (1992) (summarizing the historical trend toward allowing affirmations as substitutes for oaths).

These secular alternatives are crucial to the freedom of believers as well as non-believers to participate fully in the public life of the community. Indeed, Article II's provision allowing presidents the choice to swear or affirm to do their duty was inspired by the needs of the Quakers, whose religious principles prevented them from swearing oaths. See, e.g., Arlin M. Adams and Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. Pa. L. Rev. 1559, 1630 (1989); see also Michael McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1473-75 & n. 324 (1990).

II. In context, the phrase "under God" is suitably generic and so would satisfy the Establishment Clause test for including religious elements in a publicly sponsored Pledge of Allegiance ceremony.

Many, indeed most, Americans consider themselves religious. See, e.g., George Gallup, Jr., and D. Michael Lindsay, *Surveying the Religious Landscape: Trends in U.S. Beliefs* 23 (1999) ("Almost two-thirds of Americans confidently affirm God's existence" and ninety-five percent of Americans believe in "God or what they term a 'Higher

Power.'"). It is understandable that many Americans find the familiar use of religious language to solemnize their public commitments both natural and appropriate. Hence the practice of swearing an oath of office or swearing to tell the truth in Court. It is likewise understandable that many Americans find it natural and appropriate to recite the Pledge of Allegiance in its now established form, which characterizes the object of allegiance – our nation – not only as "one Nation . . . indivisible," but also as "under God." Laws creating publicly sponsored civil ceremonies may recognize and accommodate these preferences by incorporating religious elements, provided that they respect the requirements imposed by the Establishment Clause: (1) the religious elements of the publicly sponsored ceremony must be fundamentally generic and non-sectarian; and (2) the ceremony must provide for an officially recognized, fully secular alternative to its religious elements.

The first of these requirements is very demanding. Most invocations of religion carry substantial and specific theological content. They will therefore tend to put the government in the constitutionally impermissible position of "appearing to take a position on questions of religious belief." *County of Allegheny v. ACLU*, 492 U.S. at 594. For that reason, only the most minimal and generic references to religion or God are constitutionally acceptable. The classic example of the sort of thin and generic reference that satisfies this stringent requirement is the common, emphatic ending to an oath: "So help me God."

The use of the words "under God" in the Pledge of Allegiance is much the same. It expresses only the minimal idea that the American republic is part of the domain of things material and mortal that is in some undefined

sense "under" an undefined "God." It does not specify that America is Christian, Judeo-Christian, or affiliated with any other theology or group of theologies. It does not express any particular idea about God's will or even whether the referenced God is the kind of entity that has a will. Nor does the Pledge take a view about whether America is behaving in a fashion that is appropriate to a nation "under God" or whether America is blessed or unique in being "under God."

Like the oaths sworn by presidents and witnesses, the reference to "under God" is reasonably interpreted as a public expression of solemnity and respect in a vocabulary suitable to religious participants. Thus, contrary to the reasoning of the United States Court of Appeals for the Ninth Circuit (See, e.g., *Newdow v. U.S. Congress*, 292 F. 3d at 608), the inclusion of the phrase "under God" within the District's pledge ceremony does not by itself render the ceremony unconstitutional. Because that phrase is fundamentally generic and non-sectarian, the constitutionality of the District's ceremony depends upon whether the District has supplied a suitably secular alternative for students who wish to participate in the pledge without endorsing the religious elements of the ceremony.

III. The Constitution permits the Elk Grove School District to invite students to recite the Pledge of Allegiance, including the words "under God," but on the crucial condition that the District also offers its students an officially recognized, secular form of the Pledge that does not include those words.

In order for the District's pledge of allegiance ceremony to be constitutional, the District must supply students with an officially recognized, fully secular alternative to its

religious formulation of the Pledge. The District would thereby give students the choice between religiously inflected and wholly secular forms of participation. That is the choice that Article II guarantees to presidents when they take office and to witnesses when they vow to tell the truth; school children surely deserve no less when asked to profess allegiance to their country.

Unfortunately, the District's pledge ceremony does not afford students this constitutionally vital alternative. The District provides no officially recognized, secular version of the Pledge which omits the "under God" language. The District does, of course, permit students to opt out of the pledge ceremony entirely, as the Constitution requires it to do. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943). But this confronts students in the Elk Grove schools with a blunt choice between reciting the religious formula or not participating in the ceremony at all. Those who wish to affirm their allegiance to their country without using any religious language are left with no officially recognized means for doing so.

This policy fails to comply with constitutional requirements. The Constitution requires not merely that students be free from government compulsion to utter religious phrases, but that they be fully able to participate in civil ceremonies without regard to their religious convictions (or lack thereof). The capacity to participate fully in public life is an essential aspect of their equal standing within the community. By denying some students this opportunity on the basis of their religious convictions, the District's pledge policy offends the Establishment Clause's core prohibition against "'mak[ing] adherence to a religion relevant in any way to a person's standing in the political community.'" *County of Allegheny v. ACLU*, 492

U.S. at 594 (1989), quoting *Lynch v. Donnelly,* 465 U.S. at 687 (O'Connor, J., concurring).

A pledge policy that offers no officially recognized, fully secular alternative has another deep constitutional vice. It conveys the unmistakable message that those who find it distasteful or an affront to their system of beliefs to pledge their allegiance to a nation described as being "under God" are not worthy of participating in a community ceremony of national allegiance. This is an unhappily vivid instance of a public ceremony with religious content carrying the message to those outside the religious mainstream "that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Santa Fe Independent School District v. Doe*, 530 U.S. at 309-10, quoting *Lynch v. Donnelly*, 465 U.S. at 688 (1984) (O'Connor, J., concurring).

Accordingly, the Elk Grove School District's present practice with regard to the Pledge of Allegiance is unconstitutional. The Elk Grove Schools are not obliged to abandon the Pledge, but rather, are merely obliged to offer an officially recognized, secular alternative to the Pledge, an alternative that does not include the words "under God."

There are surely many ways in which this constitutional obligation could be discharged. Purely by way of example, consider the following possibility: At regular and sensible intervals, Elk Grove School District teachers could remind their students that there are two appropriate forms in which the Pledge may be recited; that neither of these forms should be more or less esteemed as a means of affirming one's loyalty to the Nation; and that the question of which form of the Pledge should be recited is a matter of

personal choice for each student to make. One form of the Pledge would include the phrase "under God." The other form could simply omit that phrase, or substitute other appropriate language (for example, "one Nation, *of equals,* indivisible . . .").

CONCLUSION

In its present form, the ritual recitation of the Pledge of Allegiance in the Elk Grove School District is unconstitutional. Accordingly, The judgment below should be affirmed. But the question of the appropriate remedy is somewhat more complex. The choice of means to the end of providing an officially recognized, secular alternative to the Pledge of Allegiance in its present form is surely the prerogative of the Elk Grove School District in the first instance. Ultimately, the courts below may be called upon to approve that choice. The case should be remanded, perhaps with an instruction of the sort used by the Court on a prior occasion: "The judgment of the Court of Appeals remanding this case to the District Court is affirmed, but further proceedings in the District Court are to be consistent with this opinion." *Hills v. Gautreaux*, 425 U.S. 284, 306 (1976).

Respectfully submitted,

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